FILED
OCT 30 1975

In The

Supreme Court of the United States

October Term, 1975

No. 75-45

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., *Petitioners,*

vs.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC.,

Respondents.

On Petition For a Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

PETITION FOR REHEARING

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Counsel for Petitioners

PETITION FOR REHEARING

Petitioners respectfully move this Court for an order (1) vacating its denial of the petition for a writ of certiorari entered on October 6, 1975 and (2) reinstating in the court below Appeal No. 74-1685 for proceedings on the merits, consistent with due process of law. As ground for this motion, petitioners state the following.

1. Appeal No. 74-1685, dismissed below, was timely, according to the record.

Relevant facts of record show that the appeal dismissed below, No. 74-1685, was in fact timely. (App. 2a and 74-1685 docket sheets filed in this Court) Concisely, said appeal was taken from the district court order initially entered on April 22, 1974. (App. 1e) Within 10 days thereof, however, the motion for its reconsideration and for amendment of findings was filed and served. (App. 1f) Said motion was timely under F.R.Civ.P. Rules 59(e) and 52(b) and it stopped the running of time to appeal therefrom. F.R.A.P. Rule 4(a). The order denying the motion was entered on June 5, 1974

(App. 1h) thereby making the April 22nd order final and appealable. The notice of appeal therefrom was filed on July 2, 1974. (App. 1i) Being within 30 days as prescribed by F.R.A.P. Rule 4(a), the notice of appeal was timely and thereby it vested appellate jurisdiction. In transmitting the record and in docketing the appeal, the provisions of F.R.A.P. Rules 11 and 12 were complied with. (See 74-1685 docket sheet filed in this Court, entry dates of July 16, Aug. 13, and Sept. 9, of 1974.)

That the appeal, No. 74-1685, was timely and conferred appellate jurisdiction was expressly acknowledged in respondents' appellate brief below filed in this Court (Record item 3, p. 1).

2. The arbitrary dismissal of Appeal No. 74-1685 below denied due process of law.

Contrary to incontrovertible facts of record, the court below arbitrarily dismissed Appeal No. 74-1685, holding that "this appeal was not timely." (App. 1j; emphasis added.)

In S.E.C. v. Vance, Inc., 283 F2d 304, 305 (C.A.3 1960), the court below said that "This court ordinarily will dismiss an appeal only for want of jurisdiction." Accordingly, in Appeal No. 74-1685, the court below dismissed it without exercising jurisdiction.

As pointed out in petitioners' Reply Memorandum herein, respondents attempted to confuse this Court in misrepresenting the dismissed appeal to be two previous appeals, Nos. 73-1905 and 73-1936. Had it been so, the court below would have exercised its vested jurisdiction in No. 74-1685 and affirmed or reversed the district court instead of dismissing No. 74-1685 saying "this appeal was not timely." (Emphasis added.) In light of S.E.C. v. Vance, Inc., Id., the court below should have exercised jurisdiction but it did not. Therefore, it denied due process of law in Appeal No. 74-1685.

This unusual departure from due process was not previously presented to this Court because it could and would have been remedied if this Court had granted the petition for certiorari to review the

questions therein presented (i.e. Federal rules administration and inter-circuit conflict on rule-vested powers).

CONCLUSION

For the reasons set forth above, pursuant to Rule 19(1)(b), this Court's power of supervision is invoked to remedy the arbitrary denial of due process of law. Petitioners pray that Appeal No. 74-1685 be reinstated in the court below for usual proceedings on the merits.

Respectfully submitted,

Clifton C. Tang,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is confined to the grounds specified in Rule 58(2).

Clifton C. Tang

Clifton C. Tang

Dated: October 28, 1975